MBF FINANCE BHD

v.

NGOI THIAM WOH

HIGH COURT MALAYA, IPOH
JAMES FOONG J
[CIVIL SUIT NO: 22-68-99]
9 AUGUST 2001

CIVIL PROCEDURE: *Pleadings - Statement of defence - Failure to inform increase of interest rate - Plea of negligence and misrepresentation - Whether valid defences - Allegations of fraud and conspiracy - Proof of - Whether there was agreement between parties to do an unlawful act or to do a lawful act by unlawful means - Notice of demand - Whether notice must be of similar character and nature as that of the claim in the proceedings - Correctness of amount claimed - Bank Pembangunan (M) Bhd v. Limpo Sdn Bhd*

TORT: *Negligence - Sale and purchase agreement - Whether there must be adequate particulars in pleadings - Negligent misrepresentation - Whether proven*

The plaintiff, MBf Finance, executed a loan agreement with the defendant to finance the purchase of one unit of 'condotel'. For this purchase, the defendant signed a sale and purchase agreement with the developer, ie MBf Properties, while the management company of the property was MBf Hotel with whom the defendant signed a sub-lease agreement for his property. Thereafter, the defendant ceased on his repayment for the disbursed loan, and the plaintiff subsequently initiated this suit against the defendant for the amount due thereon by default of the loan agreement. The defendant raised 11 defences categorically itemised in his statement of defence to rebut the plaintiff's claim. Items number four, six and two of the defences were dismissed on the grounds for want of particulars, irrelevancy and that they were unsupported by evidence.

Held:

[1] Regarding the accusation of the plaintiff for not informing the defendant on the increase of interest rate in item five, this defence is demolished by the various letters sent to the defendant informing of changes made to the BLR, which in turn affected the amount of interest charged on the defendant's loan.

[2] On the claim of negligence in item 11 of the defence, there were no particulars of negligence elaborated. It is not enough for the defendant to merely allege that the plaintiff was negligent. Sufficient particulars must always be given in the pleadings to show precisely in what respect the plaintiff is negligent and the details of the damage sustained.

[3] Item seven of the defence involves allegation of misrepresentations made by the plaintiff's manager, one Siew, to the defendant. From the facts, there was no reason for Siew to hold himself out to make such representations. Such representations were more likely to be made by the developer rather than the financier.

[4] In defences number eight and nine, the defendant, in brief, claimed that the plaintiff, MBf Properties and MBf Hotel conspired; (i) on the misrepresentations stated above; and (ii) to defraud the defendant into purchasing the said property and obtaining a loan from the plaintiff. To succeed in a claim of conspiracy, the defendant must prove there was an agreement between the plaintiff, MBf Properties and MBf Hotel to do an unlawful act or to do a lawful act by unlawful means.

[4a] There was no evidence, however, to support this element of an agreement between these parties to do such unlawful acts. Although these three companies bear similar initials, *ie*, "MBf", before their names, this does not mean that they were all manned by the same officers whose actions in one, would be said to be similar in the other company. Further, although each of these companies held shares in the other, it is difficult to infer that one entity is in control of the other to imply common intention.

[5] Defence number three concerns the notice of demand. The only notice relied on by the plaintiff to make this claim did not demand for the full outstanding principle sum and interest due. In *Bank Pembangunan (M) Bhd v. Limpo Sdn Bhd* it was held that a demand is a proper demand, even if it does not specify the precise amount of the debt. The court agrees with this proposition provided the claim in the proceedings and that of the letter of demand is of a similar nature and character.

[5a] Nevertheless, in this present proceeding, the claim of the plaintiff is of a different nature and character from that of a letter of demand. Here, the claim is for the entire outstanding sum due under the loan and not for the installments as the letter of demand requested.

[6] Item one of the defendant's defences disputes the correctness of the amount claimed. Apparently, there was a discrepancy between the sum stated for the same category in para. 6 and para. 8 of the statement of claim. Further, during re-examination, it was announced that a certain sum has been written off from the outstanding sum due. This not only attracts adverse inference but casts grave doubt on the accuracy of the amount due on the entire sum as claimed. As such, the court is not convinced that the amount as claimed by the plaintiff is the correct sum due under the said loan.

[Plaintiff's claim dismissed with costs]

Case(s) referred to:

Bank Pembangunan (M) Bhd v. Limpo Sdn Bhd [1998] 4 MLJ 433 ***(dist)***

Esso Petroleum Co Ltd v. Alstonbridge Properties Ltd & Ors [1975] 3 All ER 358 ***(foll)***

Mulcahy v. R [1868] LR 3 HL 306 ***(foll)***

West Rand Central Mining Co v. R [1905] 2 KB 391 ***(foll)***

Other source(s) referred to:

Bullen & Leake & Jacob's, *Precedent of Pleadings*, 13th edn, p 679

For the plaintiff - James Davidason (Karuvanan); M/s Maxwell Kenion Cowdy & Jones

For the defendant - Kuthaya; M/s Ku & Partners

Reported by Raja Vishnu Sivarajah

JUDGMENT

James Foong J:

Introduction

The plaintiff is a licensed finance company. It gave a loan of RM232,650 to the defendant on 19 November 1994 to finance the purchase of a unit of 'condotel' in Penang known as "Park Paradise of Penang" (Park Paradise). This loan was to be repaid over 15 years at a monthly installment of RM12,555.67.

A condotel is, I am told, a word coined recently in the property market to describe a hotel building with units of room or suite that are sold by the developer to members of the public. A purchaser of such unit has an option to either reside in the unit he purchased or rent it back to the developer or a hotel management company who would operate a hotel in the building. This unit will then be treated like a hotel room to be let out to paying guests. The primary advantage of this scheme is that the developer needs not bear the entire building cost for building the hotel and the purchaser of a unit would

receive the benefit of an agreed rental from the developer or hotel management company. Certain arrangements can also be made with the developer or management company for the owner to reside in his own unit either occasionally or on long term basis with certain consideration.

The developer of Park Paradise condotel is a company known as MBf Properties Services Sdn Bhd (MBf Properties). It sold a unit consisting of a one-bedroom suite bearing no. 4 on the 5th floor (the said property) in the said condotel to the defendant.

For this purchase, the defendant signed a sale and purchase agreement with MBf Properties. As security for the loan taken by the defendant from the plaintiff, this sale and purchase agreement was assigned to the plaintiff. Besides, the defendant also executed a loan agreement (the loan agreement) with the plaintiff on 19 November 1994.

The management company of Park Paradise was MBf Hotel Sdn Bhd (MBf hotel) with whom the defendant signed a sub-lease agreement for his property.

The loan granted by the plaintiff was disbursed to MBf Properties. Initially after the project was completed the defendant received his rental returns from MBf Hotel. Though there were occasional delays in his monthly installments, generally, the defendant kept up with his repayment installments until August 1997. From then on he ceased to pay.

The Plaintiff's Claim

Due to this default, the plaintiff in this suit claims from the defendant:

(a) a sum of RM260,635.47 calculated up to 9 September 1998;

(b) interest of 2% above base lending rate (BLR) of 10.75% or whatever is the prescribed rate on RM215,798.65 from 10 September 1998 till date of settlement;

(c) interest of 1% on RM260,635.47 from 10 September 1998 till date of settlement; and

(d) cost.

The Defence

The defendant raised 11 defences in his statement of defence. Before I set them out in detail, it is necessary to give a short account of what transpired after the Park Paradise was completed. As stated, initially MBf Hotel was able to render to the defendant rental income derived from the said property. But

subsequently, it failed to deliver resulting in the defendant bringing a suit against MBf Hotel. Judgment was obtained against MBf Hotel but compensation proves fruitless since MBf Hotel has only a paid up capital of RM2. Without the rental income the defendant maintains that he is unable to meet the repayment installments.

For this, he now blames the plaintiff, MBf Properties and MBf Hotel for his woes. He accuses these three companies of conspiring to misrepresent and fraud him into firstly, buying the said property with an assured income sufficient to repay the loan. Secondly, of entering into the loan agreement based on such assurance. Relying basically on these, the following are the defendant's defences:

1. The amount claimed by the plaintiff is not correct.
2. The interest so claimed thereon is not in compliance with what is stated in the loan agreement.
3. There is no demand by the plaintiff for the sum claimed.
4. The plaintiff's letter dated 8 August 1998 failed to specify the breach committed by the defendant.
5. The plaintiff had not given the defendant notices for the variation of interest rate.
6. The defendant was compelled to pay interest on the loan prior to the granting of a certificate of fitness to Park Paradise.
7. The plaintiff through its manager, one Siew misrepresented to the defendant that a reputable, experienced and international company will be appointed to manage the said property and rental of the said property, collected by the manager will:

   (i) guarantee an 8 % per annum return on the investment as well as;

   (ii) providing a sufficient amount to repay for the loan installments and;

   (iii) if there is a shortfall, the defendant just needs to top it up.

By these representations, a collateral agreement exists between the plaintiff and the defendant which estopped the plaintiff from making this claim.

The defendant was induced into the loan agreement by a conspiracy between the plaintiff, MBf Properties, MBf Hotel on the misrepresentations stated above.

Conspiracy by the plaintiff with MBf Properties, and MBf Hotel to defraud the defendant into purchasing the said property and obtaining a loan from the plaintiff.

The plaintiff had wrongly and negligently advised the defendant thereby breaching its duty of care to the defendant.

The plaintiff had breached its fiduciary duty towards the defendant.

Analysis

I believe that many of the defences listed above could be amalgamated and with some deleted for want of particulars and irrelevancy. This inadequacy will be exposed in the analysis below.

I begin with item number four of the defence. This refers to a letter dated 8 August 1998 which the defendant claims that the contents fail to specify the breach committed by the defendant. But no such letter is ever mentioned in the statement of claim and neither is such a letter ever referred to throughout the trial. My guess is that the defendant has the date mixed up with, probably, another letter from the plaintiff. The defendant at trial must have detected such error. But if so, why was no application made by the defendant to amend the pleadings to correct this? Since it remains I have no alternative except to dismiss it on the ground that it is unsupported by evidence.

Next is item six of the defence. This relates to payment of interest on the loan before certificate of fitness was issued for the condotel. Again there is absolutely no evidence advanced by the defendant to support this contention. Similarly this has to be rejected. On similar vein, this also applies to item two of the defence where the defendant forwarded no evidence that interest claimed by the plaintiff in this suit is not in compliance with the terms of the loan agreement.

Regarding the accusation of the plaintiff for not informing the defendant on the increase of interest rate in item five of the defence, this is demolished by the various letters sent to the defendant informing of changes made to the BLR which in turn affected the amount of interest charged on the defendant's loan though not all such letters were produced by the plaintiff but those tendered are sufficient to imply a probability that all such letters were sent to the defendant whenever necessary.

On the claim of negligence in item 11 of the defence, I find no particulars of negligence elaborated. It is not enough for the defendant to merely allege that the plaintiff was negligent. He must set out facts to show the alleged negligence was due to a breach of duty of care owed by the plaintiff to the

defendant. In short, it ought to state the facts upon which the supposed duty was founded and the breach which the plaintiff is charged – see the case of *West Rand Central Mining Co v. R* [1905] 2 KB 391 at 400. This means that sufficient particulars must always be given in the pleadings to show precisely in what respect the plaintiff is negligent and the detail of the damage sustained – see Bullen & Leake & Jacob's, *'Precedent of Pleadings'*, 13th edn at 679. Likewise, this applies to the claim for breach of fiduciary duty. There is no divulgence in what capacity was the plaintiff to the defendant to justify the creation of such a duty and what was the nature of this duty breached.

I shall now deal with item seven of the defence. This involves allegation of misrepresentations made by the plaintiff's manager, Siew, to the defendant. There is no necessity to restate these representations since they are disclosed in the earlier part of this judgment under defences. Towards these assertions, Siew has categorically denied them. He maintains that he has not even met the defendant until the commencement of the trial of this case. The defendant's application for the loan to finance the purchase of the said property was processed by his staff and approved by the regional manager. I tend to believe him on this point. The plaintiff is a finance company. Though it was asked to lend support to this project it was not the developer. In fact the plaintiff was not even exclusive end-financier. There were other financial institutions providing loans to other purchasers of units in Park Paradise. Under these circumstances, why then should Siew hold himself out to make such representations. Such representations were more likely to be made by the developer rather than the financier. I think the defendant was attracted and convinced to purchase the said property by a brochure given to him at the time of purchase rather than by any oral representation made by anyone. This brochure contains all the representations he alleged. This includes: a reputable and internationally connected management company would be appointed, and the 8% annual net rental yield. But this brochure was not prepared or printed by the plaintiff and neither was there evidence to implicate the plaintiff was the one who gave this booklet to the defendant.

I shall now turn to defences number eight and nine. To succeed in a claim of conspiracy, the defendant must prove that there was an "agreement of two or more to do an unlawful act or to do a lawful act by unlawful means" – see the case of *Mulcahy v. R* [1868] LR 3 HL 306 at 317. The unlawful act accused of must be in reference to the misrepresentation and fraud alleged to be perpetuated on the defendant by the three parties accused of: plaintiff, MBf Properties and MBf Hotel. But there is no evidence to support this element of an agreement between these parties to do such unlawful acts. Though these three companies bear similar initials – "MBf' before their names but this does not naturally mean that they were all manned by the same officers whose

thoughts and actions in one would be said to be similar in the other company. The defendant had claimed that each of these companies held shares in the other. MBf Properties was a wholly owned subsidiary of MBf Holdings Bhd and this public limited company in turn held 10,651,216 shares in MBf Capital Bhd which possessed 1,266,029,100 shares in the plaintiff. But such information proves very little except, at most, to show cross shareholdings. Without knowing what percentage these shares amount to in the total paid-up capital in each entity, it is difficult to infer that one unit is in control of the other to imply common intention. Further, except for the RM2 paid up capital of MBf Hotel there is no information as to who owned these shares, let alone who were the officers in charge. Thus when there is a failure to establish an agreement of the three parties to do an unlawful act, the defences number eight and nine must fail.

The next defence to be dealt with is number three. This concerns the notice of demand. The only notice relied on by the plaintiff to make this claim is a letter dated 2 June 1998 – exh. P7. But this is only for a demand for RM37,991.18 which is made up mainly of an aggregate of outstanding installments for the months of July 1997 to April 1998. It is not a demand for the full outstanding principle sum and interest due thereon by default under cl. 6.01(b) of the loan agreement which says: "The whole of the said loan and other moneys hereby secured shall become immediately repayable ... if the Borrower shall default in the payment to the lender of any money payable under the provisions hereof". In an attempt to overcome this short coming, Davidason, counsel for the plaintiff, argues that it is not necessary to specify the actual amount due in such a notice of demand. To support this contention he cited the judgment of Jeffery Tan J in *Bank Pembangunan (M) Bhd v. Limpo Sdn Bhd* [1998] 4 MLJ 433 where at p. 438 the learned judge, after careful consideration of all authorities, expounds as follows:

> Hence, the essential principle, with regard to a debtor or guarantor, is the debtor or guarantor be given reasonable opportunity to comply with the demand before the creditor can enforce or realise the security rather than that demand must specify the precise amount of the debt. In determining whether the debtor/ guarantor has had such opportunity, it would be relevant to take into account the debtor's knowledge, lack of knowledge or means of knowledge of the amount due and the information which the creditor has provided in this respect, including the respond which he made to any inquiry by the debtor. **A demand is still a proper demand, even if it does not specify the precise amount of the debt**. (emphasis added).

I do not disagree with this proposition provided the claim in the proceedings and that of the letter of demand is of a similar nature and character. But here, the claim of the plaintiff in this proceeding is of a different nature and character from that of a letter of demand. In this proceeding the claim is for the entire outstanding sum due under the loan. It is no longer for installments as the letter of demand in exh. P7 requested. As Justice Walton in *Esso Petroleum Co Ltd v. Alstonbridge Properties Ltd & Ors* [1975] 3 All ER 358 says at 367:

> (this) changes the nature of liability: it turns a liability to pay by installments into a liability to pay the whole at once. Under these circumstances, in my judgment, even as against the principal debtor, a demand antecedent to the issue of the proceedings is a necessary prerequisite of the whole cause of action. I would put it this way: that where there is a pre-existing obligation to pay the debt by installments, the demand that it be paid in one lump sum is an act which radically changes the nature of the debtor's obligation, and so is an essential ingredient of any cause of action to recover the lump sum.

I subscribe to this approach. The demand of 2 June 1998 is never for the full balance sum due under the loan as is permitted under cl. 6.01(b) of the loan agreement. It was only for a number of outstanding installments due at that material time. This is definitely different in nature and character to the former. And when the nature of the liability is of a different form, like in this case, where it is a claim for the full balance sum rather than just for outstanding installments, then the prerequisite under cl. 2.09 of the loan agreement needs to be complied with. This is a notice of demand to be sent to the defendant requiring him to make satisfaction within seven days from date of such notice. Such notice of demand is a *sine qua non* and failure to comply, and failure to comply, as is the situation here, is fatal to this plaintiff's claim.

I shall now deal with the last of the defendant's defences – item 1. This disputes the correctness of the amount claimed. Regarding this, it is relevant to firstly refer to the first prayer in the statement of claim. There the plaintiff has inserted a sum of RM260,635.47 as the principal amount due by the defendant as at 9 September 1998. This is similar to the grand total as set out in the particulars contained in para. 6 of the statement of claim. But there is an item in this particulars showing: "interest for late payment". It amounts to RM4,732.79. This contradicts the amount for this same category in para. 8 of the statement of claim. There it is printed: "RM5,328.62". This is very curious when the plaintiff offered no explanation for this discrepancy. Secondly, after intensive cross examination on the accuracy of the accounts, Siew, the plaintiff's former manager suddenly in re-examination announced that a sum of RM59,726.64 has been written off by the plaintiff from the

outstanding sum due by the defendant under the loan agreement. This is exceedingly strange when no prior disclosure was made and reasons given for this deduction. This immediately attracts adverse inference to the genuiness and correctness of the amount claimed. Question is raised as to whether such write off was tailored to suit the amount claimed in this action. Undoubtedly such deduction is generosity but rather uncommon in a licensed finance company when no request was made by the defendant. Further, there is also no indication from the plaintiff towards which provision of the debt was this reduction made. Was it towards writing off interest or the principal debt? This is pertinent since the plaintiff is challenging the accuracy of the amount due by him under the loan agreement. To these, the plaintiff's reply is that such windfall should not be questioned; the defendant should be grateful that such a substantial sum had been reduced from his outstanding account.

I disagree with this approach that if such a bonanza happens to leap onto the lap of the defendant he should remain silent. This is not only arrogant but cast grave doubt on the accuracy of the amount due on the entire sum as claimed. For this, I am not convinced that the amount as claimed by the plaintiff is the correct sum due under the said loan.

Findings

Based on my reasons expressed above, I hereby dismiss the plaintiff's claim with cost.